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Notes

WHITEWASHING EXPRESSION: USING COPYRIGHT LAW TO PROTECT RACIAL IDENTITY IN CASTING

Brandon Johnson

ABSTRACT—Porchlight Music Theatre, a non-equity theatre company in Chicago, decided to capitalize on the popularity of Lin-Manuel Miranda’s smash hit *Hamilton* by producing one of Miranda’s earlier works, *In the Heights*. This earlier work tells the story of a predominantly Latinx community in New York’s Washington Heights neighborhood. Porchlight’s production, however, received significant negative attention when it was revealed that the lead character—Usnavi, an immigrant from the Dominican Republic—would be played by a white actor. While casting white actors in nonwhite roles is nothing new and has been a persistent (and persistently criticized) practice in both theatre and film, the casting for *In the Heights* struck a nerve. This particular production incensed the Chicago theatre community because of the importance of racial identity to the story. *In the Heights* focuses on the lives of immigrant families and their daily struggles with the gentrification of their neighborhood. Casting a white actor in the lead role in such a story elicited a significant backlash.

This Note examines the damage done to authorial intent when the racial identity of casting undermines key elements of the author’s expression, and proposes that the existing tools of U.S. copyright law may provide a solution. Current production licensing and casting practices do not afford adequate protection of authorial intent regarding key character traits such as racial or gender identity. Consequently, this Note urges an incorporation of the moral rights concept of the right of integrity into the current copyright framework through an expansion of derivative rights protections. By focusing on when character identity elements are central to the expression of the author, these extensions of existing law will allow playwrights to protect the integrity of their work in subsequent productions without unduly inhibiting the artistic expression of the theatre companies performing the work.

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INTRODUCTION

In the Heights, a musical by Lin-Manuel Miranda and Quiara Alegria Hudes, tells the story of first- and second-generation Latinx Americans.¹ The show is a “slice of life” piece of theatre focusing on a three-day span over the Fourth of July and employs many of the typical conventions of musical theatre: love stories, disapproving parents, struggles for survival, death, and healing. However, beneath this standard musical theatre superstructure, the Latinx characters suffer from an undercurrent of alienation. This alienation stems from the pride they share in the culture they have developed in their predominantly Latinx neighborhood and from a fear of how increasing gentrification will alter that culture. In the summer of 2016, Porchlight Music Theatre in Chicago announced the cast for its upcoming production of *In the*

¹ All descriptions of the plot of *In the Heights* come from LIN-MANUEL MIRANDA & QUIARA ALEGRIA HUDES, *IN THE HEIGHTS* (2005).

Heights.² In addition to the primarily non-Latinx production team,³ the casting of the production garnered significant attention for casting a white actor of Italian descent in the lead role of Usnavi, the Dominican narrator of the show.⁴ Despite objections from the authors,⁵ and accusations within the theatre community of mounting a “whitewashed” production,⁶ Porchlight defended its casting decision, claiming that the theatre company took a “colorblind” approach when casting its shows.⁷

Porchlight’s *In the Heights* was not the only production this year to come under fire for casting white actors in nonwhite roles. In fact, it was not even the only production in the Chicago area to draw such criticism. Just a few months before Porchlight announced its cast for *In the Heights*, the Marriott Theatre received extensive criticism when it announced its cast list for a production of *Evita* that featured only one Latinx actor.⁸ Nor was Chicago the only theatre market attracting criticism for casting non-Latinx actors in choice Latinx roles. Just a few weeks after Porchlight’s production of *In the Heights* ignited significant controversy, Phoenix Theatre Company in Arizona announced that it would stage a production of the show featuring

² Diep Tran, *Whitewash ‘In the Heights’? Chicago, You Can Do Better*, AMERICAN THEATRE (July 27, 2016), <https://www.americantheatre.org/2016/07/27/whitewash-in-the-heights-chicago-you-can-do-better> [https://perma.cc/D8TZ-ZUAV].

³ Tommy Rivera-Vega, *Porchlight’s Whitewashing of In the Heights Narrator is a Letdown for Latinx Community*, CHICAGO READER (Aug. 3, 2016, 7:00 AM), <http://www.chicagoreader.com/Bleader/archives/2016/08/03/porchlights-whitewashing-of-in-the-heights-narrator-is-a-letdown-for-latinx-community> [https://perma.cc/55BJ-XE75] (noting that only the assistant director identified as Latinx).

⁴ Morgan Greene, *A White Actor Is Cast in ‘In the Heights,’ Setting Off a Complicated Debate*, CHICAGO TRIBUNE (Aug. 14, 2016), <http://www.chicagotribune.com/entertainment/theater/ct-latino-casting-porchlight-in-the-heights-ent-0815-20160814-story.html> [https://perma.cc/W4KM-YAWA].

⁵ Tran, *supra* note 2. Tran quotes the following from her interview with Quiara Alegria Hudes: “Casting the roles appropriately is of fundamental importance” because “[f]or decades, the vast majority of Latino roles were maids, gangbangers, etc. It’s demoralizing, obnoxious, and reductive of an entire people. It’s a lie about who we are, how complicated our dreams and individuality are.” *Id.*

⁶ See, e.g., *id.*; Rivera-Vega, *supra* note 3.

⁷ See Adam Hetrick, *Porchlight Artistic Director Responds to In the Heights Casting*, PLAYBILL (Aug. 17, 2016), <http://www.playbill.com/article/porchlight-artistic-director-responds-to-in-the-heights-casting> [https://perma.cc/7QRN-FJYG]. Michael Weber, Porchlight’s artistic director, stated that: “Only after offers were made and jobs accepted were the nuances of the artists’ ethnic backgrounds definitively revealed through our standard post-hiring PR questionnaires.” *Id.*

⁸ See, e.g., Morgan Greene, *Where Are the Latino Actors? Upcoming ‘Evita’ Sparks Casting Criticism*, CHICAGO TRIBUNE (Mar. 17, 2016, 7:00 PM), <http://www.chicagotribune.com/entertainment/theater/news/ct-marriott-evita-terry-james-casting-draws-criticism-20160317-story.html> [https://perma.cc/Q2ST-CLE8?type=image]; Kris Vire, *Marriott Theatre Faces Criticism Over ‘Evita’ Casting*, TIMEOUT CHICAGO (Mar. 17, 2016, 5:01 PM), <https://www.timeout.com/chicago/blog/marriott-theatre-faces-criticism-over-evita-casting-031716> [https://perma.cc/JB2J-QTPG].

an Iranian actor as Usnavi.⁹ While different from the problem of whitewashing, Latinx leaders in the local theatre community criticized this casting choice for perpetuating the stereotype that “brown is brown.”¹⁰

Moreover, altering racial identity in casting is not confined to theatrical productions. Hollywood has a long history of casting white actors to play characters of color. In fact, the first feature film with synchronized sound, *The Jazz Singer*, featured the white actor Al Jolson in full blackface.¹¹ While Jolson played a white character in the film who only performed in blackface, the popularity of the production indicates how well-accepted the practice of blackface performance was. Many other cringeworthy casting choices have gained infamy over the years, including Mickey Rooney’s cartoonish portrayal of the Asian character Mr. Yunioshi in *Breakfast at Tiffany’s*,¹² Elizabeth Taylor’s turn as the titular Egyptian Queen in *Cleopatra*,¹³ and Laurence Olivier’s revival of blackface in a 1965 production of *Othello*.¹⁴ More recent films such as *Aloha*,¹⁵ *The Lone Ranger*,¹⁶ *Prince of Persia*,¹⁷ and *Ghost in the Shell*¹⁸ show that whitewashing remains common in casting decisions.

Many critiques of whitewashing coming from legal academics have focused on the harm the practice does to actors of color and, consequently, many propose solutions from employment discrimination law, particularly

⁹ Kerry Lengel, ‘*In the Heights*’ Casting Controversy Comes to Phoenix, AZ CENTRAL (Aug. 19, 2016, 9:33 AM), <http://www.azcentral.com/story/entertainment/arts/2016/08/19/phoenix-theatre-in-the-heights-casting/88877340> [https://perma.cc/CED5-HDMP].

¹⁰ *Id.* Ricky Araiza, the artistic director of Teatro Bravo, criticized the casting, saying:

There is an artist of color who is not Latino being cast in a part of someone who is Latino, which I feel can be just as dangerous because to me, as a Latino, that’s saying “brown is brown.” There’s white, and then there’s “the ethnics.” As long as it’s someone who’s brown in this part, that’s filling the role. That’s how it reads to me.

Id.

¹¹ THE JAZZ SINGER (Warner Bros. 1927).

¹² BREAKFAST AT TIFFANY’S (Paramount Pictures 1961).

¹³ CLEOPATRA (20th Century Fox 1963).

¹⁴ OTHELLO (Warner Bros. 1965).

¹⁵ ALOHA (Columbia Pictures 2015) (featuring the white actress Emma Stone as a “half-Asian” character).

¹⁶ THE LONE RANGER (Walt Disney Pictures 2013) (starring white actor Johnny Depp as the Native American character “Tonto”).

¹⁷ PRINCE OF PERSIA: THE SANDS OF TIME (Walt Disney Pictures 2010) (starring white actor Jake Gyllenhaal as the eponymous Persian prince).

¹⁸ GHOST IN THE SHELL (Paramount Pictures 2017). The casting of Scarlett Johansson as Major Motoko Kusanagi created an internet backlash as fans of the original manga series criticized the studio for failing to cast Asian-American actors in the role. Cady Lang, *People Use Ghost in the Shell Meme Generator to Mock Whitewashing*, TIME (Mar. 14, 2017), <http://time.com/4701118/ghost-in-the-shell-whitewashing-memes> [https://perma.cc/BG9U-ZBWT].

Title VII.¹⁹ However, employment law merely addresses the actor's grievance and ignores the *author's* interest in protecting expression connected to racial identity. This Note focuses on the impact of whitewashing on that intended expression and how U.S. copyright law, as applied, fails to adequately protect it.

Copyright law draws a distinction between the ideas presented in an author's work and the expression of those ideas: ideas are not protected, expression is.²⁰ However, U.S. copyright law, with its focus on the pecuniary rights of authors, has provided only minimal protection of the "moral rights" of authors.²¹ Some scholars have advocated importing explicit moral rights protections into U.S. law to safeguard the "integrity rights" of authors.²² Incorporating a moral-rights-inspired concept of a right of integrity into the existing copyright framework could effectively protect authorial intent even when it is expressed through racial identity in casting. This Note proposes that courts adopt a limited moral rights theory in the casting context primarily by expanding the concept of derivative works recognized under current

¹⁹ See, e.g., Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 495 (2001) ("[A]n authenticity justification may be the best justification for directors seeking to discriminate in casting actors of a particular race . . ."); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 2 (2007) (arguing that Title VII does not provide an adequate legal solution for racial discrimination in casting); William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 228 (1998) ("[A] BFOQ [bona fide occupational qualification] for race should apply to the practice of hiring an African-American actor to play the role of an African American . . .").

²⁰ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[B] (Matthew Bender & Co., Inc. rev. ed. 2009) ("Notwithstanding the denial of copyright protection for the facts set forth in a factual account, protection attaches to the literal form of expression of an account, assuming it to be original . . .").

²¹ See *infra* Section II.C. What actually constitutes a "moral right" of an author varies under different legal regimes, but the basic premise is summarized by Professor Mira Sundara Rajan as the idea that "harm to the work is, in fact, a form of damage to the author himself." MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY* 7 (2011). The two most discussed aspects of moral rights are the right of attribution, which protects an author's right to ensure that her work is properly connected to her name, and the right of integrity, which protects the work itself from "distortion, modification, or mutilation." *Id.* at 12.

²² See, e.g., Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213 (2006) (recommending that the United States adopt certain aspects of moral rights law from the United Kingdom's moral rights scheme); Otto W. Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579 (1991) (advocating a "labeling" remedy for moral rights infringements); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (noting some of the failures of copyright law to protect the personal rights of authors and advocating a more robust adoption of moral rights).

copyright law.²³ Such a step would further protect authorial expression without unduly burdening subsequent performances.

This Note proceeds in four parts. Part I traces the role of race and casting in theatrical productions and outlines the potential problems with current casting practices. Part II examines the limited role that copyright law has played in protecting authorial control over casting and the inadequacy of employment law and contract law to provide adequate solutions. It then provides a brief overview of moral rights theory. Part III proposes that the United States incorporate the moral rights concept of a right of integrity into existing intellectual property law to allow playwrights to control racial identity in casting when racial identity is central to the author's intended expression. Lastly, Part IV addresses potential objections to allowing playwrights to exercise a more extensive role in protecting casting, including enforceability and First Amendment concerns.

I. CASTING PRACTICES

This Part provides a quick overview of the often antagonistic relationship between race and casting to underscore how racial identity can affect authorial expression, and why it is important to allow authors to protect that identity in the casting of subsequent productions. By examining both the historical disconnect between characters of color and actors of color, and reviewing how current casting practices have failed to remedy this disconnect, this Part establishes why a right of integrity to protect racial identity in casting is needed.

A. *A Brief History of Race in Casting*

Professor Harvey Young, a leading scholar on theatre and race, has written that the concept of the "other" has long pervaded theatrical productions. He notes that, for example, even when roles were available to actors of color, they tended to be stereotypical depictions focused on alienating the character from those around him.²⁴ Even the earliest dramatic scripts existing in Western culture, the comedies and tragedies of ancient Greece, strategically use the "otherness" of certain characters to impart a message to the audience.²⁵

²³ 17 U.S.C. § 103(b) (2012).

²⁴ HARVEY YOUNG, *THEATRE & RACE* 17–25 (2013). Professor Young does not believe this identification of characters of color as "other" is a thing of the past. Rather, it remains a dominant treatment of diverse characters. *Id.*

²⁵ *Id.* at 17 ("[T]he fascination with looking at people who are deemed 'other,' different, and problematic appears in the earliest dramatic texts."); *see also, e.g.*, EURIPIDES, *THE BACCHAE* (the

Similarly, some of Shakespeare's most enduring characters were identified primarily by their otherness: Othello, the Moorish soldier trying to gain a reputation in a conquered land;²⁶ Shylock, the Jewish moneylender ostracized by the Christian Venetian society that depended on his trade to finance the city;²⁷ and Caliban, the "monstrous" native inhabitant of Prospero's island whose unexplained rage drives much of the action of Shakespeare's final play.²⁸ All portrayed something outside the everyday world inhabited by Elizabethan audiences.

However, while the characters were designed to stand out as "the other" in the minds of the audience, they would have primarily been played by actors who were racially, culturally, and religiously identical to their audience. Racially heterogeneous characters were played by racially homogenous actors. Young men played women, old men played young men, and, by the time a theatrical tradition developed in the United States, white actors played characters of all different races.²⁹ The development of blackface, redface, and yellowface on American stages produced scenes of racially stereotyped performers that would shock modern-day audiences.³⁰

These types of blatantly racist casting practices began to dissipate in part due to the emergence of nontraditional casting in the 1950s.³¹ After World War II, some theatre practitioners sought to increase diversity by encouraging playwrights to tell stories centered around characters of color.³² At roughly the same time, other theatre companies, such as the New York Shakespeare Festival, sought to bring actors of color onto their stages immediately in part by casting diverse actors in roles previously played by white actors.³³ The concept of nontraditional or "colorblind" casting began with works in the public domain like the Shakespearean canon and the tragedies and comedies of classical Greece.³⁴ Because these works had long

outsider is revealed to be the god Dionysus, sent to bring vengeance upon the sacrilegious city officials); SOPHOCLES, *OEDIPUS REX* (the outsider who becomes king which leads to the downfall of the city).

²⁶ WILLIAM SHAKESPEARE, *OTHELLO*.

²⁷ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.

²⁸ WILLIAM SHAKESPEARE, *THE TEMPEST*.

²⁹ See YOUNG, *supra* note 24, at 36–56.

³⁰ *Id.*

³¹ ANGELA C. PAO, *NO SAFE SPACES: RE-CASTING RACE, ETHNICITY, AND NATIONALITY IN AMERICAN THEATER* 3 (2010). The term "nontraditional casting," which refers to the casting of actors of color in traditionally white roles, however, did not become commonplace until the 1980s. *Id.*

³² See BRANDI WILKINS CATANESE, *THE PROBLEM OF THE COLOR[BLIND]: RACIAL TRANSGRESSION AND THE POLITICS OF BLACK PERFORMANCE* 33 (2011) (alteration in original) (describing the playwright August Wilson's disdain for colorblind casting).

³³ PAO, *supra* note 31, at 3.

³⁴ See *id.* at 3–4.

since passed beyond the control of their authors, colorblind casting in productions did not implicate any concerns regarding authorial intent. As these diverse productions became more popular and accepted, the practice of colorblind casting gradually spread, and companies began employing nontraditional casting. The contemporary casting practices discussed below still rely in large part on colorblind casting, which was itself a reaction to overt racism in casting.

B. Current Casting Practices

While the brief account above introduces the negative historical connotations associated with race and casting, an overview of the current production licensing process highlights the ongoing need for protecting racial identity in casting. Playwrights typically work with either a publishing house or an agent to license their scripts.³⁵ A theatre company performing an author's work must first secure the rights to the work by applying for a public performance license from the publishing house or agent.³⁶ Once the license is granted, the company must obtain written permission prior to making certain alterations to the script.³⁷ Prohibited alterations include cutting out profanity, combining characters, and even changing the gender of the character.³⁸ Conspicuously absent from this list is the racial identity of the character.

However, even though the racial identity of a particular character is not on the standard list of prohibited alterations made available by prominent publishing houses such as Samuel French, there is some evidence that playwrights consider this element of their characters to be protectable expression. For example, the president of the playwrights' union, the Dramatists Guild, issued a public letter on November 18, 2015, declaring the union's position that the racial identity of characters is protectable as part of the "stage directions" of the copyrighted work.³⁹ While the union believed

³⁵ Telephone Interview with Harvey Young, Chair of Theatre, Northwestern University (Oct. 14, 2016).

³⁶ *Id.*; see also 17 U.S.C. § 106(4) (2012) (granting copyright holders the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to *perform* the copyrighted work publicly" (emphasis added)).

³⁷ *Frequently Asked Questions*, SAMUEL FRENCH, <http://www.samuel french.com/faq#script1> [https://perma.cc/XA5J-CPYU].

³⁸ *Id.*

³⁹ Tracey Paleo, *Dramatists Guild President on Writer's Rights*, FOOTLIGHTS (Nov. 18, 2015), <http://footlights.click/2015/11/18/dramatists-guild-president-on-writers-rights> [https://perma.cc/2AFT=FHR4] ("Casting is an implicit part of the stage directions; to pretend otherwise is disingenuous."). Doug Wright, the president, stated further that:

that such protections already existed, the current casting process indicates that this belief was unfounded.

Today, the debate on nontraditional casting centers principally around whether “colorblind” casting or “color-conscious” casting better serves the theatrical community.⁴⁰ Colorblind casting focuses on casting “the most skilled performer for each part,” regardless of race.⁴¹ Proponents of colorblind casting typically focus on the employment opportunities it provides to actors of color.⁴² However, critics point to the homogenizing effects of this casting practice and argue that a focus on “color-conscious” casting instead would provide the same employment benefits for actors without negatively reinforcing the concept of white hegemony.⁴³ Both sides of this debate focus on the effect casting methods have on employment opportunities and only look at the author’s expressive intent as a marginal concern.

This scholarly concern about the effects casting practices have on actors is well-founded. Whitewashing is nothing new, and actors of color have long felt the brunt of lost opportunities. As an illustration, one of the more infamous instances of theatrical whitewashing occurred when the British producers of *Miss Saigon* attempted to open a Broadway production of the West End hit.⁴⁴ The London-based producer, Cameron Mackintosh, wanted to bring the show to New York and announced his intention to keep the well-known actor Jonathan Pryce in the role of the Engineer.⁴⁵ However, Pryce was a white British actor, while the Engineer was a Eurasian brothel owner.⁴⁶

Directors who wish to dramatically reimagine material can choose from work in the public domain. But when a play is still under copyright, directors must seek permission if they are going to make changes to the play, *including casting a character outside his or her obvious race, gender or implicit characteristics*. To do so without meaningful consultation with the writer is both a moral and a legal breach.

Id. (emphasis added).

⁴⁰ YOUNG, *supra* note 24, at 56–63.

⁴¹ *Id.* at 56.

⁴² See, e.g., *id.* at 58 (“For the actor, the draw of colorblind casting practices is that hiring decisions are premised on talent and not whether a person possesses the ‘right look.’ The benefits of a colorblind theatre are difficult to ignore.”).

⁴³ See, e.g., CATANESE, *supra* note 32, at 35 (“In the color-blind future, therefore, blacks and other minority groups will experience drastically different lives, having been liberated from racial concerns, but whites, presumably, will step unaltered into a postracial America.”).

⁴⁴ See Lois L. Krieger, Note, “*Miss Saigon*” and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 SYRACUSE L. REV. 839 (1992); see also Mabel Ng, Note, *Miss Saigon: Casting for Equality on an Unequal Stage*, 14 HASTINGS COMM. & ENT. L.J. 451 (1992).

⁴⁵ Krieger, *supra* note 44, at 841.

⁴⁶ *Id.*

After receiving complaints from many of its Asian-American members, Actors Equity Association, the stage actors union in the United States, announced that it would not permit Pryce to perform the role in the Broadway production.⁴⁷

In response to Equity's decision, Mackintosh decided to shut down the entire Broadway production.⁴⁸ Because closing the show would have resulted in the loss of numerous other Asian-American roles in a Broadway show, Equity received protests and complaints from its members and promptly reversed its decision to disallow Pryce's performance.⁴⁹ While Mackintosh did eventually mount the Broadway production, the incident sparked a rethinking of racial politics in casting and led to vocal opposition to theatrical whitewashing.⁵⁰

However, because it was the actors and their union objecting to Pryce's appearance in *Miss Saigon*, instead of the author, little thought was given to authorial intent in addressing the casting decision. As the number of playwrights of color has risen, the number of playwrights telling stories that center around race has also grown; it is therefore time to look beyond the impact of whitewashing on actors of color and to explore the effect it has on the author's intended expression. Unfortunately, the current legal system offers few solutions.

II. COPYRIGHT AND MORAL RIGHTS

The current copyright structure in the United States offers few formal moral rights protections.⁵¹ However, Congress has declined to pass legislation recognizing moral rights in artistic work, claiming that existing copyright law provides the requisite protections.⁵² In light of this apparent contradiction, it is necessary to understand which areas of copyright law Congress believes provide sufficient moral rights protections. It is also necessary to understand the judiciary's reluctance to protect the right of integrity in casting to fully appreciate the solution this Note proposes. This

⁴⁷ *Id.* Equity had this authority based on its contractual power to restrict international actors from performing on American stages. *See* Ng, *supra* note 44, at 458. However, that power was limited to deciding whether the international actor seeking employment was deemed an international "star," and thus exempt from Equity's prohibitions. *Id.* at 455. Complicating matters was an earlier Equity decision granting Pryce "star" status, which prevented Equity from denying such status for the *Miss Saigon* production. *Id.* at 456.

⁴⁸ Ng, *supra* note 44, at 456.

⁴⁹ *Id.* at 457.

⁵⁰ Krieger, *supra* note 44, at 843–44.

⁵¹ *See* 17 U.S.C. § 106A (2012).

⁵² *See infra* Section II.C.

Part begins with an overview of the justifications for U.S. copyright law before moving on to an examination of the tools currently available for playwrights to protect their expression in subsequent casting. Finally, this Part provides a brief overview of moral rights theory and the limited extent to which moral rights have been recognized in U.S. law.

A. Utilitarian Justifications for Copyright

Utilitarian, incentive-based justifications dominate U.S. copyright law theory.⁵³ This is evident in the Constitution itself, which provides the basis for U.S. copyright law by giving Congress the power “[t]o *promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁴ The constitutional text thus authorizes Congress to provide copyright protection to increase the amount of scientific and “useful” arts available to the public. Additionally, the current version of the Copyright Act goes to great lengths to describe the *economic* benefits granted to the copyright holder.⁵⁵

Indeed, the consensus view among judges and scholars alike is that the current role played by copyright law in the U.S. legal system is to encourage the creation of artistic works.⁵⁶ Adherents to the utilitarian view argue that without a guarantee of economic protection, artists will not invest the time

⁵³ See, e.g., NIMMER & NIMMER, *supra* note 20, at § 1.03[A] (explaining the utilitarian underpinnings of copyright law).

⁵⁴ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

⁵⁵ See 17 U.S.C. § 106 (2012). Section 106 grants copyright holders the exclusive rights:

- (1) to reproduce the copyrighted work in copies . . .
- (2) to prepare derivative works based upon the copyrighted work . . . [and]
-
- (4) in the case of literary, musical, dramatic, and choreographic works . . . to perform the copyrighted work publicly

Id.

⁵⁶ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[T]he limited grant [of exclusivity through copyright] is . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim [of copyright law] is, by this incentive, to stimulate artistic creativity for the general public good.”); see also 2 MARK A. LEMLEY ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2016, ch. IV, at 12 (2016) (“American copyright law can thus be seen as primarily striving to achieve an optimal balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works.”); NIMMER & NIMMER, *supra* note 20, at § 1.03[A] (“[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities.”).

and labor necessary to produce creative works.⁵⁷ This economic-based view has guided U.S. copyright law since the nation's founding.

While utilitarian theory remains the bedrock justification for U.S. copyright law, some scholars argue that economic protections do not adequately incentivize artistic creation. Professors Jessica Silbey and Roberta Rosenthal Kwall, for example, argue that it is the need to create that drives many authors and artists regardless of the uncertainty of economic gain.⁵⁸ They both conducted interviews with artistic creators and each described the relationship between the artist and her work as akin to a parent-child relationship, where the artist feels a responsibility to protect the work itself.⁵⁹

In light of these criticisms of the actual effectiveness of a utilitarian, incentive-based model of copyright, perhaps it is time to rethink what function copyright serves in the real world. Do artists create because they expect monetary reward for the creation? Even if this is the case, does the current structure of our copyright law provide economic benefits to the author? Or rather, as Professor Kwall argues, are the true beneficiaries of our current system the copyright holders, who tend to be distributors rather than creators of artistic work?⁶⁰

B. Existing Avenues of Protecting Integrity Rights in Casting

If we accept Silbey and Kwall's position that authors desire creative control more than economic reward,⁶¹ then it follows that a right of integrity that allows creators greater control over their work may better serve the underlying policies of copyright law.⁶² Even assuming that utilitarian

⁵⁷ See, e.g., LEMLEY ET AL., *supra* note 56, at 10–11.

⁵⁸ See, e.g., ROBERTA ROSENTHAL Kwall, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 17 (2010) (arguing that the creative process is more akin to a spiritual undertaking than an economic one); JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 53 (2015) (claiming that creators create to express their "identity and personality" more than for economic gain). But Kwall has noted elsewhere that "the primary objective of our copyright law is to ensure the copyright owner's receipt of all financial rewards to which he is entitled . . . by virtue of ownership." Kwall, *supra* note 22, at 2.

⁵⁹ Kwall, *supra* note 58, at 17 ("[P]ainter Max Ernst has written that '[t]he author is present as a spectator, indifferent or impassioned, at the birth of his own work.'"); SILBEY, *supra* note 58, at 52–53.

⁶⁰ Kwall, *supra* note 22, at 2 ("[T]he primary objective of our copyright law is to ensure the copyright owner's receipt of all financial rewards to which he is entitled . . . by virtue of ownership." (emphasis added)).

⁶¹ See *supra* note 58 and accompanying text.

⁶² This assumes that we accept the idea that authorial intent *should* be protected. Literary theorists have long argued over the significance of authorial intent. Postmodernists such as Roland Barthes have argued that the meaning of a work is created by the reader's perception of it and that no fixed authorial intent can be derived from the text. See Roland Barthes, *The Death of the Author* (1967), reprinted in *THE*

motives should drive copyright law,⁶³ providing a benefit that better matches what creators value would likely be more effective in incentivizing the creation of artistic works. This Section examines the existing protective structures under current law that the courts could use to provide some measure of creative control in subsequent casting of a production. While courts have been reluctant to use these tools to provide moral rights protections, they could easily be extended to achieve such goals.

1. *Derivative Works*

The primary potential tool for protecting a right of integrity in casting provided by current copyright law may be the exclusive right “to prepare derivative works based upon the [original] copyrighted work” protected by § 106(2) of the Copyright Act.⁶⁴ Section 101 of the Copyright Act defines a derivative work as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, *or other modifications* which, as a whole, represent an original work of authorship⁶⁵

If courts decided to construe a production that changed the racial identity of a character to constitute the creation of a derivative work, then perhaps the current law would provide the type of integrity protections lacking due to the absence of moral rights. A close reading of the statute does potentially provide a textual basis for such an extension because the statutory language refers to “other modifications.”⁶⁶ The current judicial understanding of a derivative work, however, does not extend to changes of this nature. For example, courts have, in practice, been quite reluctant to recognize such a broad understanding of derivative works and instead have focused more on traditional understandings of derivative works, such as

DEATH AND RESURRECTION OF THE AUTHOR? 3 (William Irwin ed., 2002). Intentionalist theorists have questioned this position and contend that the author’s subjective intent should influence our understanding of a work’s meaning. See William Irwin, *Intentionalism and Author Constructs*, in *THE DEATH AND RESURRECTION OF THE AUTHOR?*, *supra* at 191. Despite this philosophical disagreement, the law has long recognized the importance of the individual author, and this Note follows this long-held understanding.

⁶³ See *supra* Section II.A.

⁶⁴ 17 U.S.C. § 106(2) (2012).

⁶⁵ *Id.* § 101 (emphasis added).

⁶⁶ *Id.*

translations of a foreign language work into English or a dramatization of a written literary work.⁶⁷

But the idea of extending the concept of derivative works protection to include some form of a right integrity is not unprecedented. At least one court has considered “transformation” of a copyrighted work to create such a substantial change that the result qualified as a derivative work. In *Gilliam v. American Broadcasting Cos.*⁶⁸ the Second Circuit addressed whether the comedy group Monty Python could file suit against ABC to prevent future airing of their work after ABC first aired severely edited versions of three episodes.⁶⁹

Monty Python previously signed a contract with the British Broadcasting Corporation (BBC), agreeing that the BBC would air the TV show *Monty Python’s Flying Circus*.⁷⁰ The contract required that the BBC receive permission from Monty Python before making changes to the aired version, but the agreement also allowed the BBC to “license the transmission of recordings of the television programs in any overseas territory.”⁷¹ The BBC exercised its licensing rights, and Time-Life purchased the rights to distribute *Flying Circus* in the United States.⁷² Time-Life then proceeded to edit three thirty-minute episodes to air during a ninety-minute slot on ABC.⁷³ The version that aired never received Monty Python’s approval and twenty-four minutes of the ninety minutes of content had been removed either to make room for commercials or due to “offensive or obscene matter” in the original.⁷⁴

Monty Python claimed that the edits “mutilated” their work and sued to prevent ABC from airing any other *Flying Circus* programs without their approval of the final edited version.⁷⁵ One of the threshold issues the Second Circuit examined was whether Monty Python owned the copyright in the recorded program.⁷⁶ Interestingly, the court avoided this question. Monty Python contended, and the court agreed, that the copyright of the recorded program was irrelevant because the version ABC aired was a derivative work

⁶⁷ See Konrad, *supra* note 22, at 1593 (describing traditional court practices).

⁶⁸ 538 F.2d 14 (2d Cir. 1976).

⁶⁹ *Id.* at 18.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

⁷² *Id.* at 17–18.

⁷³ *Id.* at 18.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

based on the original, and, as the creators of the original script, Monty Python was entitled to prohibit ABC's unlicensed derivative work.⁷⁷

While the *Gilliam* decision shows the potential of the derivative works doctrine to protect an author's integrity rights, seemingly no other courts have followed the rationale of the Second Circuit, instead choosing to point to Monty Python's contractual agreement with the BBC requiring their approval of edits to any aired version of the work.⁷⁸ Consequently, derivative works have so far failed to provide a reliable substitute for the integrity right protection afforded by moral rights theory. However, derivative works could provide significant integrity rights protections if the courts alter their current understanding of what constitutes a derivative work.⁷⁹

2. Contractual Options

Another potential solution to the lack of moral rights protections would be to rely on contract law and put the burden on playwrights to include restrictive clauses in their licensing agreements that would grant them greater control over casting.⁸⁰ As discussed in Part I, licensing agreements under the current casting structure create some obstacles to authorial control over racial identity in casting.⁸¹ But a more familiar contractual problem faced by playwrights is their relative lack of bargaining power. In fact, one commentator has argued that "[t]he principal difficulty with the contractual analogue is that economic forces compel even the authors of performance art to waive their personality rights"⁸²

Because playwrights are often unknown at the time they make their work publicly available through licensing, they do not typically have the bargaining power or sophistication to protect interests such as the "integrity"

⁷⁷ *Id.* at 19–20.

⁷⁸ See Konrad, *supra* note 22, at 1593 ("[I]n the fifteen years since the United States Court of Appeals for the Second Circuit issued the *Gilliam* opinion, no other court ever has used *Gilliam* to redress personality rights violations.").

⁷⁹ See *infra* Section III.A.2. Such an expansive interpretation of the derivative works right is well within the realm of possibility. Professor Jessica Litman for example, in arguing against what she sees as far too expansive copyright protections in the digital age, writes that under the language of the statute itself, "current law may make it technically illegal to watch a movie and then imagine what it would have looked like if the studio had *cast some other actor* in the leading role," as this would constitute a derivative work. JESSICA LITMAN, *DIGITAL COPYRIGHT* 22 (2006) (emphasis added).

⁸⁰ See Konrad, *supra* note 22, at 1586 ("In general, of all artists, performance art authors have the closest approximation to a contractual form of moral rights when they contract with interpretive artists and producers.").

⁸¹ See *supra* Section I.B.

⁸² See Konrad, *supra* note 22, at 1587.

of their work.⁸³ Because playwrights typically only make money through licensing public performances of their work (compared to, for example, a novelist who typically is compensated based on the distribution of her work), they have almost no leverage when entering into a licensing agreement.

Bargaining inequality becomes even more apparent when one considers which playwrights have successfully employed licensing protection for subsequent casting. Typically, strong authorial control of casting has only been exercised by playwrights (or their estates) with sufficient resources and name recognition to grant them a strong bargaining position. For example, both the Gershwin Estate and the Beckett Estate have successfully shut down productions failing to comply with the casting desires of the author.⁸⁴ The Gershwin Estate stipulates in licenses for “certain performances” of *Porgy and Bess* that black characters must be played by black actors.⁸⁵ The Beckett Estate is also well-known for imposing stringent licensing requirements, not only preventing any alteration to the script or setting of Beckett’s plays, but also strictly controlling casting of subsequent productions, including the race and gender of the actors.⁸⁶ However, these estates are the exception rather than the rule because the stature and success of those playwrights provided them with much greater bargaining power than that possessed by the typical playwright.

An additional problem of relying on licensing is that it can give the playwright too much control over casting. For example, the Gershwin and Beckett Estates do not necessarily use licensing to dictate casting only when racial or gender identity of the actor is central to the expression of the author.

⁸³ See *id.* (“[T]he entrepreneurs of the performance art industry have a decided bargaining advantage that performance art authors find hard to counter.”). Konrad explains: “Even if a performance art author manages to secure contractual provisions protecting his personality interests, the author still faces the difficulty of protecting his personality interests from the virtually unlimited number of wrongful acts falling outside the specific terms of the contract.” *Id.* at 1587–88.

⁸⁴ See KWALL, *supra* note 58, at 45 (describing actions taken by the Beckett Estate to control casting); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 325–27 (2006) (describing the successful efforts of the Gershwin Estate to control casting).

⁸⁵ Arewa, *supra* note 84, at 325–26; see also *Gershwin v. Whole Thing Co.*, No. CV 80-569 TJH (Px), 1980 WL 1182, at *3 (C.D. Cal. Mar. 10, 1980) (“[W]hen Mr. Gershwin licenses the full grand musical play ‘Porgy and Bess,’ he demands that each performance meet a number of requirements. One such requirement is that the play be performed by a Black cast and a Black chorus. The reason for this is quite simple. George and Ira Gershwin created ‘Porgy and Bess’ to be a musical play about Southern Blacks.”).

⁸⁶ See KWALL, *supra* note 58, at 45. However, the Beckett Estate has experienced various levels of success in asserting moral rights protections to control casting in subsequent productions outside of the United States. *Id.* (noting that while the Beckett Estate was successful in stopping an all-female production of *Waiting for Godot* in France, it failed to prevent other productions in the Netherlands).

Because playwrights can contract freely, they may insist upon exacting control over many aspects of future productions. This often results in a more oppressive effect on casting than would the approach this Note advocates for in Part III, which would be limited to situations where racial identity is central to the author's expression.⁸⁷

C. Moral Rights and U.S. Copyright Law

In light of the emphasis that U.S. copyright law places on the pecuniary interests of artists and creators, it is unsurprising that moral rights have not been widely adopted.⁸⁸ Other parts of the world, however, have recognized moral rights for well over a century. The Berne Convention, drafted in 1886, provides some form of moral rights protections to artists in the 175 countries that have ratified it.⁸⁹ Of this panoply of rights, the two most important have been the right of attribution and the right of integrity, which are guaranteed in Article 6*bis* of the document.⁹⁰ This Note focuses primarily on the right of integrity, which Professor Kwall describes as a "guarantee[] that the author's work truly represents her creative personality, and is free of distortions that misrepresent her creative expression."⁹¹ As discussed below, a legislative adoption of the moral rights concept of the right of integrity could be the most effective way to allow playwrights to prevent productions of their work with a cast that violates the essential expression of the work.⁹²

Congress, however, has been quite reluctant to extend moral rights protection to authors, even after international commerce concerns convinced Congress to sign on to the Berne Convention. In 1994, Congress signed the Agreement on Trade-Related Aspects of Intellectual Property Rights

⁸⁷ For a discussion of what makes the racial identity central to the expression of the author, see *infra* Part III.

⁸⁸ See Kwall, *supra* note 58, at 25–26 ("Copyright law in the United States fails to afford authors, in an explicit fashion, comprehensive moral rights such as the right to have their works attributed to them or the right to have their works maintained and presented in a manner consistent with their artistic vision.").

⁸⁹ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The relevant text of Article 6*bis* reads:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Id. For a list of countries that have ratified the Berne Convention, see WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 [https://perma.cc/47AV-37SU].

⁹⁰ Berne Convention, *supra* note 89.

⁹¹ Kwall, *supra* note 58, at 5–6.

⁹² See *infra* Section III.A.1.

(TRIPS), which incorporated much of the Berne Convention.⁹³ But Congress explicitly excluded adoption of Article 6*bis*.⁹⁴ Congress had the ability to do this because “the means of redress for safeguarding the Article 6*bis* rights ‘shall be governed by the legislation of the country where protection is claimed.’” That clause gives each member state significant leeway in the implementation of moral rights.⁹⁵

So far Congress has done little to ensure that moral rights are protected at the level contemplated by the Berne Convention. This congressional inaction seems to be due in large part to the belief that existing intellectual property laws provide adequate protection for the rights granted by Article 6*bis*.⁹⁶ Despite these congressional contentions that copyright law adequately protected an author’s moral rights at the time of the treaty’s adoption, Congress has since taken some small steps toward more significant moral rights protections. The most concrete example of this is the passage of the Visual Artists Rights Act of 1990 (VARA),⁹⁷ which allows the “author of a work of visual art”⁹⁸ several exclusive rights not otherwise granted by the Copyright Act.⁹⁹ Additionally, VARA follows the moral rights tradition of

⁹³ KWALL, *supra* note 58, at 37.

⁹⁴ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81 (1994).

⁹⁵ 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[B] (Matthew Bender & Co., Inc. rev. ed. 2009) (quoting Berne Convention, *supra* note 89).

⁹⁶ H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 (“While some [expert witnesses] argued that adherence to [Article 6*bis* of] Berne required the enactment of new laws, the vast majority of those using adherence contended that existing laws, both Federal and State, statutory and common, were sufficient to comply with the requirements of the Convention.”); *see also* Amy L. Landers, *The Current State of Moral Rights Protection for Visual Artists in the United States*, 15 HASTINGS COMM. & ENT. L.J. 165, 173 n.55 (1992) (“Congress, however, has determined that U.S. law prior to the Act complied with Berne requirements and that the Act merely brought U.S. law into greater harmony with laws of other Berne countries.” (internal quotations marks omitted)).

⁹⁷ 17 U.S.C. § 106A (2012).

⁹⁸ A “work of visual art” is limited to: “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author” or a similarly limited “still photographic image produced for exhibition purposes only . . .” 17 U.S.C. § 101 (2012).

⁹⁹ The author of a work of visual art:

- (1) shall have the right—
 - (A) to claim authorship of [the] work . . .
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
- (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
- (3) subject to the limitations set forth in section 113(d), [the author] shall have the right—

allowing the author to retain integrity and attribution rights regardless of whether the author holds the copyright to the work.¹⁰⁰ By *adding* explicit protections for a visual artist's right of integrity through VARA, Congress implicitly acknowledged that the current copyright structure does not adequately protect moral rights; however, Congress has not taken additional steps to expand these types of protections to authors outside the visual arts.

Given the extremely limited protections provided by VARA and the failure to extend moral rights protections to other areas of copyright law, it is unlikely that Congress will provide a legislative solution to protect racial identity in casting any time soon. In light of this difficulty, we next ask: What legal avenue would provide playwrights with the appropriate level of protections? Part III takes up this question and proposes a judicially created solution.

III. APPLICATION OF A RIGHT OF INTEGRITY IN CASTING

If we accept that authorial intent is worth protecting, the question becomes: What methods can provide the best form of that protection? In the context of color-conscious casting, adopting the moral rights concept of the right of integrity could serve as a useful tool for playwrights. The application of the integrity right, however, should be confined to those situations where the racial identity of the character is central to the expression of the playwright. For an initial, concrete example of how moral rights theory might operate in the real world, recall the story of Porchlight's production of *In the Heights* that began this Note. In the context of a play dealing with the difficulties of assimilation as an immigrant, a strong argument can be made that the racial identity of characters is central to expressing authorial intent because of the struggle Latinx communities to preserve aspects of their cultures in the face of gentrification. If the authors of *In the Heights* felt that the production had violated their intent, under a moral rights theory, they would have actionable rights against the production. This Note next examines what such an action might look like with and without legislative approval, and which remedies would best protect authorial expression in casting.

-
- (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
 - (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Id. § 106A.

¹⁰⁰ *Id.* ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, *whether or not the author is the copyright owner.*" (emphasis added)).

A. Implementation

The central question this Note examines is what steps could or should be taken to implement a right of integrity into U.S. copyright law in a way that will adequately protect a playwright's expression in subsequent casting of a production. One possibility is for Congress to provide explicit statutory protections. This is unlikely in light of congressional refusal to adopt the moral rights provisions of the Berne Convention.¹⁰¹ However, other legislative actions such as the passage of VARA, which recognized at least a limited right of attribution in visual art, may indicate an opening through which additional moral rights protections could be recognized.¹⁰²

Alternatively, the judiciary could expand protections provided in the current legal structure. To date, the judiciary has been reluctant to provide moral rights protections beyond those explicitly granted by VARA.¹⁰³ However, Congress's repeated assertions that current copyright law already provides adequate moral rights protections offer some support for judicial implementation of moral rights even without new legislation.¹⁰⁴ Therefore, although judicial recognition of a right of integrity would require a change in the current jurisprudence, such a shift is more likely to prove a viable path to providing right of integrity protection to racial identity in casting than relying on congressional action.

The next two Sections examine implementation of moral rights through both the legislature and the judiciary, including recommendations for an appropriate remedial structure.

1. Legislative Implementation

The most secure way to provide legal protection of a right of integrity in casting would be for Congress to create statutory protections. While Congress has made small steps toward recognition of *some* moral rights in limited circumstances,¹⁰⁵ the overall tenor of the legislature remains as hostile toward full moral rights recognition as it was when Congress adopted the Berne Convention without moral rights protections.¹⁰⁶ This hostility appears to stem in part from Congress's belief that current U.S. intellectual property law provides adequate tools for protecting traditional moral rights

¹⁰¹ See *supra* notes 89–96 and accompanying text.

¹⁰² 17 U.S.C. § 106A (2012).

¹⁰³ See *supra* Section II.B.1.

¹⁰⁴ See *supra* Section II.C.

¹⁰⁵ See 17 U.S.C. § 106A (extending limited rights of authorship and integrity only to works of visual art).

¹⁰⁶ See *supra* Section II.C.

concerns. However, as discussed above, these tools fail to provide sufficient protection to the particular problem of racial identity in casting.¹⁰⁷ This inadequacy suggests that Congress may simply be uninterested in filling gaps in existing law and providing a firm protection for a right of integrity.

Finally, even if Congress were to act, any resulting legislation designed to protect a right of integrity would not likely address the specific problem of racial identity in casting. Under such a statutory scheme, courts would still have to examine the context of each case to determine whether the character identity at issue was truly central to the expression of the author.

2. *Judicial Implementation*

In light of the difficulties apparent in providing a legislative solution, perhaps a more effective alternative would be for the judiciary to take Congress at its word and use existing intellectual property laws to protect moral rights. However, this would require a significant change in how the courts currently view copyright protections.

While federal courts have occasionally made passing references to moral rights protections, they have not recognized a legal cause of action for right of integrity protections.¹⁰⁸ Given the Supreme Court's growing hostility to the creation of implied rights of action,¹⁰⁹ it is highly unlikely that the judiciary will find any such implication for a separate moral rights cause of action. However, a more author-friendly interpretation of existing copyright protections may allow courts to begin addressing issues of identity in casting even under the current legal framework. Additionally, such an interpretation of existing law would seem to comply with Congress's understanding of the legislative scheme.

When Congress adopted large parts of the Berne Convention into U.S. law, it explicitly excluded the moral rights provisions of Article 6*bis* on the grounds that current intellectual property laws provided sufficient protections for moral rights concepts.¹¹⁰ Considering this express congressional understanding of the current legal framework, the judiciary could begin to expand copyright protections by, for example, extending the

¹⁰⁷ See *supra* note 99; see also *supra* Section II.B.

¹⁰⁸ See *supra* Section II.B.1.

¹⁰⁹ See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (declining to recognize an implied right of action under the Fifth Amendment even in the absence of adequate alternative remedies because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" (citation omitted)); *Bush v. Lucas*, 462 U.S. 367, 378–80 (1983) (holding that the existing legislative scheme for protecting First Amendment rights in employment disputes counseled against recognizing an implied right of action).

¹¹⁰ See *supra* note 96 and accompanying text.

concept of derivative rights protections to include subsequent productions of performances when casting has fundamentally changed the expressive intent of the author.

Expanding the understanding of a derivative work to include a subsequent performance of a copyrighted play in which the casting of the production altered a fundamental component of the author's central expressive intent could provide relief for playwrights even absent congressional action. Congress has stated that it believes the current copyright system in the United States provides sufficient protections for moral rights.¹¹¹ It is hard to imagine where else in current copyright law a right of integrity could exist if not within the protections for derivative rights. But expanding derivative rights protection to cover something akin to a right of integrity in characters' racial identity would require courts to overrule prior precedent and significantly change how they view the scope of the derivative right.¹¹²

The court in *Gilliam* came close to recognizing an implicit right of integrity in an author's right to control derivative works.¹¹³ However, subsequent case law consistently distinguished *Gilliam*, pointing to the unique contractual provisions involved in the case. Adopting *Gilliam*'s reasoning and expanding derivative rights to include situations in which the casting of a production has altered part of the original author's central expression is an appropriate step to provide limited moral rights protections in U.S. copyright law.

Even if the courts were to adopt this more expansive view of derivative works, licensing agreements could be drafted to simply include a license to create a derivative work and thus frustrate authors' integrity rights. Because the typical playwright would need the revenue from licensing fees, she would still be in the same disadvantaged bargaining position¹¹⁴ and would likely have little choice but to agree to a derivative works license as well. Notwithstanding this entrenched bargaining imbalance, however, a judicial recognition that changing racial identity in casting may constitute a derivative work could still improve the current legal structure in two ways.

First, legal recognition that altering the racial identity of a character may create a derivative work would make retaining racial identity the default

¹¹¹ See *supra* note 96 and accompanying text.

¹¹² See *supra* Section II.B.1.

¹¹³ *Gilliam v. Am. Broad. Cos.* 538 F.2d 14, 19–20 (2d Cir. 1976).

¹¹⁴ See *supra* Section II.B.2.

bargaining position under which negotiations take place.¹¹⁵ Additionally, requiring a production to acknowledge that it has changed the racial identity of certain characters in a way that transforms authorial intent may encourage those seeking to license a performance of the production to cast the show in accordance with the author's intent in an attempt to avoid negative publicity.

Second, the need to negotiate for an additional license beyond just the standard public performance license may allow playwrights to extract additional revenue. This monetary gain may be inadequate if what the playwright desires is control over a work's integrity.¹¹⁶ However, requiring an additional derivative works license would at least be a financial recognition of the value of control, the loss of which must be compensated.

Thus, a judicial solution would require a shift in current derivative works jurisprudence and would not necessarily resolve the problems created by the inequitable bargaining positions held by relatively unknown playwrights. Nevertheless, it would at least create a baseline understanding within licensing negotiations that a character's racial (and gender) identity should be taken into account by theatre companies seeking to mount a public production.

B. Remedies

Regardless of whether right of integrity protections are established by the legislature or are crafted by the judiciary, such rights also require appropriate remedies. Three remedial paradigms typically recur in moral rights discussions: labeling remedies, monetary damages, and injunctions.¹¹⁷

First, a labeling remedy could allow an author of a copyrighted work to prohibit a public display, including a public performance, of the work from using the author's name in connection with the display when she feels it no longer represents her expressive intent.¹¹⁸ However, a labeling remedy principally protects attribution rights rather than integrity rights because a labelling remedy would not stop the production from proceeding. If the goal is to protect the expressive intent of the author, merely removing the author's name will not suffice. While such a remedy may prevent reputational damage

¹¹⁵ See KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 128 (2011) ("[L]icensing negotiations always take place in the shadow of copyright law's provisions—and the ways that courts have interpreted those provisions in particular cases.").

¹¹⁶ See *supra* Section II.A.

¹¹⁷ Phyllis Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. 31, 51–52 (1979); see also Konrad, *supra* note 22, at 1613.

¹¹⁸ See Amarnick, *supra* note 117, at 52. Some commentators believe that labeling remedies provide adequate protection for dramatic authors without interfering with the First Amendment rights of theatre companies performing the work. See, e.g., Konrad, *supra* note 22, at 1618–20.

to the author because she will no longer be associated with the production, the expressive intent will still be distorted by the production.¹¹⁹ Therefore, labeling does not provide an effective remedy.

Second, monetary damages could also provide a potential remedy. But defining the monetary value of the integrity of a work could be problematic. What would be appropriate compensation for altering a character's racial identity in a way that destroyed the authorial expression? Additionally, as discussed above, scholars have shown that economic incentives may not spur artistic creativity nearly as much as certainty of control.¹²⁰ Finally, this remedy may perversely cause a decrease in theatre companies choosing to produce scripts in which racial identity is central to expression for fear that they could not accurately cast the production.¹²¹ Imposing monetary damages as the appropriate remedy would likely increase this chilling effect.

Given these limits of labeling and monetary remedies, injunctive relief appears to provide the best remedy for alterations to racial identity in violation of authorial expression. At least one commentator, Otto Konrad, argues that injunctions would not be appropriate for right of integrity violations in subsequent performances of dramatic works because of First Amendment constraints.¹²² Konrad's concern centers on using injunctions to prohibit subsequent productions when the author disagrees with artistic, interpretive choices made by the production company.¹²³ This Note suggests that such injunctions would only protect the right of integrity in casting and only in situations where character identity traits are central to authorial expression. This should obviate many of the First Amendment concerns Konrad raises regarding artistic interpretation.

Moreover, injunctive relief would better align with authorial desire for control. Considering that creators may value control of their work more highly than economic benefits,¹²⁴ injunctive relief better aligns with authors' interests. Therefore, if authorial intent regarding racial identity in casting is worth protecting, injunctive relief would provide the most appropriate remedy.

¹¹⁹ However, as discussed *infra* Section IV.B, labeling may still provide an appropriate remedy in certain fair use situations.

¹²⁰ See *supra* notes 58–61 and accompanying text (discussing the extent to which some artistic creators value control over their work and a continuing relationship with the work more than monetary compensation).

¹²¹ See *infra* Section IV.C.

¹²² See Konrad, *supra* note 22, at 1590 (“While injunctive relief may be available, such relief could create serious First Amendment difficulties and could be extremely destructive for the fragile entrepreneurial aspects of the performance art industry.”).

¹²³ *Id.*

¹²⁴ See *supra* note 58 and accompanying text.

IV. POTENTIAL PROBLEMS

The proposal outlined above will likely raise several objections. This Part attempts to address some of the more salient challenges expected. Primarily, this Part will focus on three potential categories of objections: (1) application problems, such as how courts will identify when racial identity is central to expression; (2) First Amendment concerns that these restrictions might raise; and (3) the possibility that this proposal may restrict employment opportunities for minority actors.

A. Application Difficulties

Opponents of this Note's proposal that the judiciary should "read in" a limited right of integrity into derivative works protections may argue that judges of law make poor judges of artistic expression. This has been a dominant thread in copyright law at least since Justice Oliver Wendell Holmes's opinion in *Bleistein v. Donaldson Lithographing Co.*¹²⁵ However, the proposed test would not force judges to engage in evaluating the merits of dramatic works, but rather would only require courts to distinguish between elements integral to "expression" and unprotected "idea" elements. While using expression as the key determination for when playwrights can legally protect racial identity in casting will inherently require courts to engage in line-drawing exercises, courts are already familiar with this type of distinction because they use the idea-expression dichotomy to determine copyrightable subject matter.¹²⁶ Since the seminal case of *Baker v. Selden* in 1879,¹²⁷ courts have worked to distinguish between the idea presented by a copyrighted work and the expression of that idea. The upshot is, while the idea itself cannot be protected by copyright, the expression of that idea belongs exclusively to the copyright holder.¹²⁸

¹²⁵ See 188 U.S. 239, 251–52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.").

¹²⁶ See Copyright Act, 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection for an original work of authorship extend to any *idea* . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." (emphasis added)); see also 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.04[B] (Matthew Bender & Co., Inc. rev. ed. 2009) (discussing the idea-expression dichotomy).

¹²⁷ 101 U.S. 99 (1879).

¹²⁸ *Id.* at 100–01 ("Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.").

Moreover, the courts have repeatedly applied this test to dramatic works. In one of the most famous applications of the idea-expression dichotomy, Judge Learned Hand in *Nichols v. Universal Pictures Corp.* examined whether the race of certain characters was part of the author's expression and found that while the religion of the characters may have been part of that expression, their race was not central to the "main theme" of the work.¹²⁹ While Judge Hand undertook this examination to determine whether the alleged infringer in the case had misappropriated the copyright holder's expression,¹³⁰ the type of analysis necessary to make such a finding would be substantially similar to the analysis required to find that the racial identity of the character is so central to authorial expression that it should be protected.

Similarly, in *Warner Bros. Pictures v. Columbia Broadcasting System*,¹³¹ the court examined whether a well-known character in a larger work, Sam Spade, was sufficiently "expressive" to be protectable or rather just an unprotectable "idea." Dashiell Hammett entered into an agreement with Warner Bros., assigning the production company exclusive movie, radio, and television rights to Hammett's book, *The Maltese Falcon*.¹³² Hammett continued to write detective stories featuring Sam Spade, the protagonist of *The Maltese Falcon*.¹³³ He then entered into agreements with other entertainment companies to produce radio dramas focused on the character of Sam Spade.¹³⁴ Warner Bros. sued for copyright infringement, claiming that the exclusive rights agreement for *The Maltese Falcon* included exclusive media rights to the character Sam Spade.¹³⁵

While the Second Circuit ultimately found for Hammett due to the ambiguity of the contract with Warner Bros., Judge James Stephens discussed the viability of protecting fictional characters through copyright: "It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright."¹³⁶ According to the court, in the case of *The Maltese Falcon*, the character of Sam Spade was merely the "vehicle[] for the story told," and therefore an

¹²⁹ 45 F.2d 119, 121–22 (2d Cir. 1930).

¹³⁰ *Id.* at 121.

¹³¹ 216 F.2d 945 (9th Cir. 1954).

¹³² *Id.* at 946.

¹³³ *Id.* at 948.

¹³⁴ *Id.*

¹³⁵ *Id.* at 948–49.

¹³⁶ *Id.* at 950.

unprotectable idea.¹³⁷ *Nichols* and *Warner Bros.* both demonstrate that courts are no strangers to separating idea from expression. This same level of analysis could be used to evaluate the centrality of a character's racial identity to the author's overall expression.

In fact, this type of analysis has continued to develop over the years and today courts regularly apply some type of idea-expression or abstraction-filtration-comparison test to decide which elements of a copyrighted work are expressive enough to receive protection.¹³⁸ While the application of these types of tests involve some element of subjective line drawing, the fact that courts engage with these questions already means that extending this analysis to racial identity in casting would not require judges to become more involved in subjective determinations than they already are. The change would be one of degree, not of kind. Instead of determining whether a fictional character is central enough to the story to be expressive, the courts would question whether the racial identity of the character is central to the story.

Scholars have struggled to provide the most effective test for making these idea-expression distinctions,¹³⁹ and while a fully fleshed out test is beyond the scope of this Note, one aspect of the test that applies specifically to determining whether racial identity is central to expression is: Whose perspective matters? If courts look at the centrality of racial identity to expression from the perspective of the author (who presumably would be the

¹³⁷ *Id.*

¹³⁸ The abstraction-filtration-comparison test is used primarily by the Second Circuit to decide whether an allegedly infringing work has infringed on protectable expression. The court applies "levels of abstraction" to the underlying work, filters out anything that is not protectable (such as an idea or something in the public domain) and then compares what is left of the underlying work with the allegedly infringing work to identify whether infringement has occurred. *See, e.g., Comput. Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 706–12 (2d Cir. 1992) (applying the abstraction-filtration-comparison test to determine which elements of a software program were expressive and which were merely ideas). The Ninth Circuit employs an extrinsic/intrinsic test in order to filter out unprotectable ideas. *See, e.g., Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) ("The 'extrinsic test' is an objective comparison of specific *expressive* elements The 'intrinsic test' is a subjective comparison that focuses on 'whether the ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works.'" (emphasis added) (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994))). While the abstraction-filtration-comparison test more clearly defines the steps involved, the goal is the same: to identify what is protectable expression and what is an unprotectable idea.

¹³⁹ *See, e.g.,* Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197 (2016) (arguing that courts must focus on the underlying purpose of an intellectual property regime (such as copyright law) in order to properly distinguish between what is protected and what is not); *see also* Christopher Buccafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1293 (2017) (discussing the similarly difficult line-drawing problem of how courts try to differentiate between aesthetic expression and functional utility across different areas of intellectual property law).

party bringing the suit), the court would be much more likely to find that identity protectable. If the court examines the question from the perspective of the reasonable audience member, it will likely grant protection less often. This creates additional potential line-drawing problems.

But courts already deal with this question, for example, when deciding whether a work is “transformative” for purposes of a fair use defense.¹⁴⁰ Uniform agreement does not exist among courts as to whose perspective matters in determining expressive intent, but courts commonly look to either the reasonable audience member or the author/creator.

In *Campbell v. Acuff-Rose Music, Inc.*,¹⁴¹ for example, the Supreme Court found that 2 Live Crew’s use of Roy Orbison’s *Oh, Pretty Woman* was sufficiently transformative to be considered fair use primarily because the *reasonable observer* would not be confused by the parodic usage.¹⁴² On the other hand, in *Blanch v. Koons*,¹⁴³ the Second Circuit focused on the *subjective intent of the two artists* in finding that the defendant’s use of the plaintiff’s photograph was transformative. While the plaintiff’s stated intent for her photograph was to “show some sort of an erotic sense” in an advertisement,¹⁴⁴ the defendant claimed that he used a portion of the plaintiff’s work to “comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images.”¹⁴⁵ Citing these differences in the stated intent of the authors, the Second Circuit considered the defendant’s use transformative, and therefore not an infringement of the plaintiff’s copyright.¹⁴⁶

Because the right of integrity is about protecting authorial expression, it makes sense to consider the author’s viewpoint when deciding how central a character’s racial identity is to that expression. Indeed, countries with strong statutory protections for moral rights, such as Germany, tend to judge violations of integrity solely from the perspective of the creator.¹⁴⁷ However, the Berne Convention requires that alterations must be “prejudicial to . . . the

¹⁴⁰ For a fuller discussion of fair use, see *infra* Section IV.B.

¹⁴¹ 510 U.S. 569 (1994).

¹⁴² *Id.* at 590–93.

¹⁴³ 467 F.3d 244 (2d Cir. 2006).

¹⁴⁴ *Id.* at 248.

¹⁴⁵ *Id.* at 247.

¹⁴⁶ *Id.* at 252 (“The sharply different objectives that Koons had in using, and Blanch had in creating, ‘Silk Sandals’ confirms the transformative nature of the use.”).

¹⁴⁷ Eric Marcus, *The Moral Right of the Artist in Germany*, 25 COPYRIGHT L. SYMP. 93, 102 (1975) (noting that German copyright law, for example, “grants the artist the right to prohibit any distortion . . . of his work which would prejudice his lawful intellectual or personal interests in the work” (internal quotation marks omitted)).

honor or reputation” of the artist, thereby introducing a quasi-reasonableness standard into the analysis.¹⁴⁸ An author asserting a right of integrity claim under such a regime must show some type of objective harm to her honor or reputation and cannot based a claim solely on a subjective feeling of harm.

Additionally, because this Note proposes modifying existing copyright structures to incorporate only a limited concept of the right of integrity into U.S. law, courts should consider *both* the perspective of the audience *and* the artist in order to avoid extending protections to scripts in which racial or gender identity is not central to authorial expression. By examining the stated subjective intent of the author and comparing that intent with what a reasonable observer would perceive, this approach would strike an appropriate balance between the need to protect authorial expression and the ability for future creators to produce the work. If the reasonable observer would more likely than not make the connection between a character’s racial identity and the author’s stated expressive intent, then that identity should be protectable. This amalgam of perspectives would help ensure that playwrights could only control subsequent casting when identity was truly central to the expression of the work, and thereby prevent overuse of the right of integrity.

B. First Amendment Concerns

Another objection critics might raise is that imposing legal restrictions on casting would infringe on the First Amendment rights of the theatre companies seeking to stage a work.¹⁴⁹ But there are three issues with this criticism. First, as discussed above, such restrictions already exist when the author has sufficient bargaining power to impose casting requirements through contracts.¹⁵⁰ Second, limiting the protections to situations where identity is central to the expression of the author will prevent overbroad applications of the protection. Finally, there may already be an answer to this dilemma in an existing component of copyright law: fair use doctrine.

Section 107 of the Copyright Act allows courts to examine the way in which a copyrighted work is used and provides a complete defense to copyright infringement if the court considers the use “fair” after evaluating the following four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

¹⁴⁸ Berne Convention, *supra* note 89.

¹⁴⁹ See, e.g., Konrad, *supra* note 22, at 1608.

¹⁵⁰ See *supra* Section II.B.2.

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁵¹

In recent years, courts have focused more and more on the first factor, “the purpose and character of the use,” and have read a requirement of “transformative” use into this factor.¹⁵² Courts could look to the transformative nature of changing racial identity through casting and, if a company shows a legitimate expressive interest in such a change, this could provide a valid fair use defense to a right of integrity action.

Extending derivative rights protections to enable authorial control over casting, while at the same time expanding the fair use defense to protect the First Amendment rights of theatre practitioners, ultimately strikes a balance between overprotection and underprotection of the right of integrity.

C. Restricting Casting Opportunities

A final criticism is that right of integrity protections might limit the opportunities available for actors of color. But the proposal outlined above, while not unconnected to increasing diversity in theatre, is not designed to provide protection for actors of color. Rather, the goal of protecting racial identity in casting is to protect the expression of the playwright. Moral rights theories focus on the unique position of the author in connection to her work¹⁵³ and would make poor vehicles for employment protections that would be better served through changes to labor and employment laws.¹⁵⁴

However, even keeping this distinction in mind, the concerns over the potential negative effects on employment opportunities for actors of color may be unfounded. For example, opponents might argue that additional

¹⁵¹ 17 U.S.C. § 107 (2012).

¹⁵² See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”); see also *supra* notes 140–146 and accompanying text.

¹⁵³ See Christopher Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, 48 U. TORONTO FAC. L. REV. 211, 212 (1990) (“With its insistence upon both identifying a work with its author and protecting an author’s honour, reputation and the integrity of an author’s work, the doctrine of moral right as expressed in current Canadian copyright law echoes many of the principles which infuse Romantic conceptions of authorship.”).

¹⁵⁴ For proposals relating to the role of employment law in increasing diversity in casting, see, e.g., Robinson, *supra* note 19 (analyzing the legitimate role race should be allowed to play in casting decisions and advocating for the modification of Title VII to allow for such consideration); Bryant, *supra* note 19 (similarly proposing extending the “bona fide occupational qualification” provision of Title VII to allow for considering race in hiring contexts such as casting).

statutory protections are unnecessary given the ability of playwrights to use production contracts to require certain casting provisions. But, as discussed above, contractual protections are insufficient to protect subsequent castings because of the limited bargaining power of most playwrights, meaning that even if these scripts are being produced, there will likely be no way to guarantee that the racial identity of the character is maintained.¹⁵⁵

Alternatively, this proposal may draw criticism because a legal requirement that subsequent productions of a play must maintain the racial identity of characters could persuade theatre companies drawing from smaller, less diverse actor pools to avoid staging a production subject to such a requirement. Adding an extra layer of statutory protections may deter theatre companies from producing the author's work at all, thereby removing even the opportunity for an actor of color to play a character of the same racial identity. However, if the actor pool lacks the diversity necessary to perform a particular production, then it is unlikely that staging the production would result in more opportunities for racially diverse actors because the racial identity of the characters would not likely be preserved anyway. Furthermore, playwrights could still make contractual exceptions for productions in areas with bona fide claims of an inability to cast the production as written.

Perhaps the most significant employment-based objection might be that, because the proposed protections focus on authorial expression, adopting this Note's proposal could give power to playwrights to prevent "colorblind" casting of productions. For example, the estate of Arthur Miller could attempt to assert a right of integrity claim to prevent productions of *Death of a Salesman* from casting a black Willy Loman, claiming that Willy's loss of white, male entitlement is part of the expression of the work.¹⁵⁶

While such a scenario might raise serious concerns, it is unlikely that such use of a right of integrity in casting identity would be the norm if courts were to adhere to a strict requirement that racial identity must be central to the expression of the author to be protected. For instance, in the *Death of a Salesman* example above, the author (or, in this case, his estate) would still have to show that Willy Loman's racial identity is integral to the expressive intent of the author. Considering the universal themes of loss of self and loss of identity, this argument may not succeed.

¹⁵⁵ See *supra* notes 82–86 and accompanying text.

¹⁵⁶ See generally ARTHUR MILLER, *DEATH OF A SALESMAN* (1949). My thanks to David Lurie for providing this example.

But because of the subjective nature of this determination, it is possible that a court might come to the opposite conclusion and hold that Willy's whiteness is central to Miller's expressive intent. If courts were to make such findings consistently, this could result in a decrease in employment opportunities for actors of color. However, the "dual perspective" approach discussed in Section IV.A and the fair use defense as discussed in Section IV.B should help prevent erroneous findings that racial identity is central to expression. Nevertheless, under a strict application of the proposed test, there might be works for which maintaining a character's racial identity will reduce the number of roles available to actors of color. While this concern is valid and solutions to this problem should be sought, such an inquiry is outside the scope of this Note, and copyright law, with its focus on the rights of authors, is a poor vehicle for addressing such inequalities.

Finally, protecting racial identity when it is central to expression could very well result in a net increase in opportunities for actors of color because it might encourage playwrights to create works focusing on characters of color. If authors know that subsequent productions must maintain racial identity, they may be more inclined to tell stories in which a character's racial identity is central to the work. Moreover, the sordid history of whitewashing in casting indicates that it is far more likely that actors of color will be deprived of roles in the absence of legal protections than that they will be denied opportunities if such protections were put in place.¹⁵⁷

CONCLUSION

Current casting practices allow theatre companies to disregard authorial expression and intent regarding character identity far too easily. While this Note focuses on racial identity, a similar analysis could apply to gender identity as well, allowing playwrights to control gender identity in subsequent productions only when it is central to the expressive intent of the author. The moral rights concept of the right of integrity provides an appropriate mechanism for combating the problems plaguing the current system.

While Congress could act and incorporate moral rights protections into U.S. copyright law, such action is unlikely. Additionally, such statutory provisions might not take casting practices into account given that this Note is the first to apply the right of integrity to casting. Therefore, courts should take Congress at its word and begin using existing copyright protections to enforce moral rights. An expansion of derivative rights protection could provide the type of legal protections this Note envisions. However, courts

¹⁵⁷ See *supra* Part I.

would need to remain vigilant when hearing challenges to casting practices to ensure that the racial identity of the character is central to the expression of the author. Additionally, a more lenient understanding of what constitutes transformational use in the context of a fair use defense for casting practices could help ensure that deviating from authorial expression in casting would be justified in certain contexts.

